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No. 04-500

Supreme Court, U.S.
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In The
Supreme Court of the United States

BENNETT LEVIN,

Petitioner,

v.

UPPER MAKEFIELD TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA; ROSE MARIE SAUTER; CONRAD BALDWIN; WILLIAM GUNSER; EDWARD X. FORD; JOHN TITTERTON; LAWRENCE SALTZMAN; JOHN WALSH; BARBARA HIRST; ROBERT GORRING; ERIC FISHER; MICHAEL FRANK; STEVEN HARRIS, ESQUIRE; GREGORY STURN, ESQUIRE; HARRIS & HARRIS, ATTORNEYS;

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner submits this brief reply in support of his Petition for a Writ of Certiorari.

In their Brief in Opposition, Respondents argue that the Court's decision last year in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198 (2003) has "definitely settled the issue" of whether the "shocks the conscience" test should be applied to substantive due process arising out of claims zoning and land-use cases. (Opp. at 7). Respondents concede that "there may have been different standards applied before [*Cuyahoga Falls*]" by the various Courts of Appeal (*id.* at 2), but they assert that those Circuit conflicts have now been resolved by *Cuyahoga Falls*.

Cuyahoga Falls, however, did not purport to extend the "shocks the conscience" test to all substantive due process claims in the zoning and land use context.[1] In

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[1] Indeed, none of the three questions granted review in *Cuyahoga Falls* involved whether the "shocks the conscience" test should be extended to zoning and land use cases:

> (1) In considering a claim against a municipal corporation for intentional discrimination arising out of a facially neutral and judicially upheld referendum petition, may the court inquire into the motivations of a handful of the citizens who expressed support for the referendum and impute those motivations to the entire municipal corporation?
>
> (2) In light of the constitutional freedom of political expression, can a disparate impact claim under the Fair Housing Act be maintained against a municipal corporation for the alleged impact of the filing of a facially neutral and judicially upheld referendum petition?
>
> (3) Does the due process clause of the constitution require a municipal corporation to issue building permits when the underlying conditions for the issuance of building permits

(Continued on following page)

Cuyahoga Falls, this Court was addressing ministerial *executive* action, namely, the refusal of a city engineer to issue building permits, and it did not even mention, much less utilize, the "shocks the conscience" test:

> We need not decide whether respondents possessed a property interest in the building permits, because the city engineer's refusal to issue the permits while the petition was pending *in no sense constituted egregious or arbitrary government conduct. See County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (noting that in our evaluations of "abusive executive action," we have held that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'").

538 U.S. at 198 (emphasis added).

Notwithstanding Respondents' categorical assertion that *Cuyahoga Falls* has "definitively settled the issue" of whether the "shocks the conscience" test applies to all substantive due process claims brought in zoning and land use cases (Opp. at 7), it is noteworthy that they have not cited *any* cases citing *Cuyahoga Falls* as support for application of that test. Instead, following *Cuyahoga Falls*, appellate courts have continued to utilize myriad different tests in these cases other than "shocks the conscience." Significantly, in *Greenbriar Village, LLC v. Mountain Brook, City*, 345 F.3d 1258 (11th Cir. 2003), which was a

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have not been met and the municipal corporation's withholding of the permits is required by the judgments of state courts of competent jurisdiction?

71 U.S.L.W. 3049.

zoning case, the Court of Appeals cited *Cuyahoga Falls* as support for the "arbitrary or irrational" test:

> Even if we were to find that the deprivation of the land disturbance Permit did implicate constitutional substantive due process protections, the City's actions were not so arbitrary or irrational as to compel us to find for Greenbriar. *See City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 123 S. Ct. 1389, 1396, 155 L. Ed. 2d 349 (2003).

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court applied the "shocks the conscience" test to a substantive due process claim arising from a high-speed police chase. This Court recognized that such a stringent test was appropriate where the actions being challenged took place under exigent circumstances, and reflected "the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Id.* at 852, *quoting Whitley v. Albers*, 475 U.S. 312, 320 (1986).

Respondents' opposition fails to proffer any rationale whatsoever for extending the "shocks the conscience" test to zoning and land use cases, which represent the antithesis of a high-speed police chase. Cases such as this one involve elected officials deliberating under color of state law as legislators, on the one hand, and as administrative judges, on the other. Indeed, in *Lewis*, this Court recognized that substantive due process claims arising from high-speed police chases present "markedly different circumstances" then those arising from "normal pretrial custody." 523 U.S. at 851. The less-stringent "deliberate indifference" test is appropriate for the latter cases because "actual deliberation is practical," and "forethought

about an inmate's welfare is not only feasible but obligatory." *Id.*

Here, too, the zoning decisions giving rise to Petitioner's claims involved "actual deliberation" and "forethought" by the Respondents. Applying the "shocks the conscience" test adopted for high-speed police chase cases to the totally dissimilar zoning cases such as this case would be "the jurisprudential equivalent of a square peg in a round hole." *United Artists v. Township of Warrington*, 316 F.3d 392, 407 (3d Cir. 2003) (Cowen, J., dissenting). It would give local zoning officials *carte blanche* to infringe upon property rights, and deprive the landowner of any realistic means of vindicating the constitutional right to substantive due process.

In sum, the pervasive conflict in the Circuits that existed before *Cuyahoga Falls* still exists. This Court should grant certiorari to eliminate the longstanding confusion among the federal appellate courts and establish a uniform standard for substantive due process review in zoning and other land-use cases.

Respectfully submitted,

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